No. 86-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILBERT LEE EVANS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is petitioner's claim of ineffective assistance of counsel, on the direct appeal of his original death sentence, moot in view of the fact that his original death sentence has been vacated and he has been resentenced to death at a sentencing proceeding free from error?

II. Was petitioner denied the effective assistance of counsel at the guilt stage of his trial for capital murder when counsel chose not to object to the prosecutor's argument?

III. Was petitioner denied the right to confront and cross-examine adverse witnesses at his resentencing proceeding when, with the petitioner's approval, a transcript was used as a substitute for the testimony of certain witnesses?

IV. Does petitioner's claim concerning recusal of the state habeas judge raise a substantial federal question?

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JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1257(3).[1]

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[1] Evans' petition is styled as a "PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ALEXANDRIA, VIRGINIA." (Ptn. 1). Likewise, in his prayer for relief, Evans requests a writ of certiorari "to review the order and opinion of the Circuit Court of Alexandria, Virginia." (Ptn. 30). This Court, however, has no jurisdiction, pursuant to 28 U.S.C. § 1257 or any other federal statute, to review the decision of a state trial court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at SA-1-2, and in the appendix to this brief in opposition at A. 1a.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. ___)." References to the appendix of the Petition for Writ of Certiorari will be designated "(App. ___)." And references to the appendix to this brief in opposition will be designated "(A. ___)."

STATEMENT OF THE CASE

On April 17, 1981, a jury in the Circuit Court of the City of Alexandria convicted the petitioner, Wilbert Lee Evans, of capital murder. After a separate hearing on the issue of punishment, the same jury recommended the death penalty. On June 1, 1981, the Circuit Court imposed the death penalty in accordance with the jury verdict. The conviction and death sentence were affirmed by the Supreme Court of Virginia on December 4, 1981. *Evans v. Commonwealth*, 222 Va. 766, 284 S.E.2d 816 (1981) (*Evans I*). (App. 17a-31a). This Court denied a petition for a writ of certiorari on March 22, 1982. 455 U.S. 1038 (1982).

Petitioner initiated state habeas corpus proceedings in April 1982. He amended his habeas petition on two occasions, the second in early January 1983. The Commonwealth confessed error in the petitioner's sentencing proceeding on April 12, 1983, and on May 2, 1983, the Circuit Court of the City of Alexandria entered an order setting aside Evans' death sentence. On September 21, 1983, the Circuit Court conducted an evidentiary hearing

to determine whether Evans should be resentenced or his sentence reduced to a life term. By an order dated October 12, 1983, the Circuit Court directed that Evans be resentenced.

On January 30, 1984, the Circuit Court impaneled a new jury for a resentencing hearing, and at the conclusion of that proceeding the jury recommended the death penalty. On March 7, 1984, the Circuit Court imposed the death penalty in accordance with the jury verdict. The Supreme Court of Virginia affirmed Evans' death sentence on November 30, 1984. *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (*Evans II*). (App. 32a-46a). This Court again denied certiorari. 105 S.Ct. 2037 (1985).

On May 14, 1985, Evans reinitiated state habeas corpus proceedings. The Circuit Court of the City of Alexandria dismissed most of E. ..is' claims without a hearing on September 18, 1985. (App. 1a-2a). An evidentiary hearing was conducted on the remainder of Evans' claims on December 16, 1985. Those claims were denied in the Circuit Court's letter opinion dated May 19, 1986 (App. 3a-13a), and Evans' habeas petition was dismissed in its entirety by an order dated June 3, 1986. (App. 14a-15a). Evans' petition for appeal to the Virginia Supreme Court was refused in an order dated February 26, 1987. (App. 16a).

STATEMENT OF FACTS

On January 27, 1981, the petitioner, a prisoner, fatally shot a deputy sheriff who was escorting him to jail in Alexandria. Evans had pretended to be a willing witness for the Commonwealth, but his sole purpose in cooperating with the authorities had been to engineer an escape after being brought to Virginia in custody from North Carolina. He planned to kill anyone who attempted to prevent his escape and he acted on this intent when he killed the victim. (App. 45a). The evidence at the resentencing hearing revealed that Evans had a significant prior history of

violent criminal conduct. (App. 45a). The jury's imposition of the death penalty was based upon a finding of the petitioner's "future dangerousness." *See* Va. Code § 19.2-264.2. (Ptn. SA-1).

REASONS FOR DENYING THE WRIT

I. Because Evans' Original Death Sentence Was Vacated And He Has Been Resentenced To Death, His Claim That He Was Denied The Effective Assistance Of Counsel On The Direct Appeal Of His Original Death Sentence Is Moot.

Evans contends that he was denied the effective assistance of counsel on the direct appeal of his original death sentence because appellate counsel failed to discover and bring to the attention of the Virginia Supreme Court or this Court the errors in the records of Evans' prior convictions upon which that death sentence, at least in part, was based.[2] (Ptn. 3, 18). Because, however, Evans' original death sentence has been vacated, and he has been resentenced to death at a proceeding free from error, his claim of ineffective assistance of counsel is moot. *See Hyman v. Aiken*, 777 F.2d 938, 941 (4th Cir. 1985) (vacating death sentence renders moot ineffective counsel claims pertaining solely to penalty stage), *vacated and remanded on*

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[2] Evans contends that this Court should grant the writ on this claim to instruct lower courts whether the effectiveness of counsel on appeal, guaranteed by *Evitts v. Lucey*, 469 U.S. 387, 389 (1985), is governed by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). (Ptn. 3-4, 16, 17 n.17, 18). As this Court has already answered that question in *Smith v. Murray*, ___U.S. ___, 106 S.Ct. 2661 (1986), no such instruction is necessary. In *Smith*, this Court expressly applied the *Strickland* standard and found that the attorney's decision in that case "not to press [a] claim on appeal" did not constitute ineffective assistance of counsel. *Smith*, 106 S.Ct. at 2667. Indeed, in Evans' case, the Commonwealth conceded in the courts below that *Evitts* and *Strickland* governed this claim. Thus, Evans' primary reason why certiorari should be granted in this case is based upon a faulty premise.

other grounds, 106 S.Ct. 3327 (1986). *See also Poland v. Arizona*, ___U.S. ___, 106 S.Ct. 1749, 1753 (1986) (when death sentence vacated on appeal, "clean slate" rule applies unless basis of decision is insufficiency of evidence). The obvious reason why Evans' claim is moot is because, having obtained the invalidation of his original death sentence, he cannot demonstrate the actual prejudice required under *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Evans' sole assertion of prejudice is premised upon his claim that if his death sentence had been vacated during his original direct appeal, the Virginia Supreme Court would have been required, as a matter of state law under *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981), to commute his sentence to life imprisonment. (Ptn. 19-20). This issue of Virginia law, however, was decided adversely to Evans in his second direct appeal[3] (App. 35a-

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[3] In *Evans II*, Evans asserted, and the Supreme Court of Virginia rejected, the same underlying claim concerning the applicability of *Patterson* to his case which he has raised in the instant petition. The Virginia Supreme Court stated as follows in *Evans II*:

> Defendant *contends* that application of the revised sentencing law to him violates the prohibition against *ex post facto* laws....Evans says [that] under the law as it existed at the time he committed his offense, at the time he was tried, at the time his first conviction was affirmed, and at all times before approval of the emergency legislation, he was entitled to a sentence of life imprisonment upon the setting aside of his death sentence. He argues that as the result of *Patterson*: "Automatic commutation in such situations thus *became a part of Virginia's law* just as surely as if it had been drafted by the legislature."
>
> *Evans contends that had the errors which led to the Commonwealth's confession of error been brought to our attention at the time of his first appeal, we would have done in Evans what we had done...previously in Patterson, and Evans would have received a life sentence. He contends the considerations which led the Court to commute Patterson's sentence...applied with full force to Evans' case....We reject defendant's con-*

36a), and again during the state habeas corpus proceedings. Because the Virginia Supreme Court, as the final arbiter of Virginia law, has determined that *Patterson* would not have been applicable to his case if his original death sentence had been vacated on direct appeal, Evans' assertion of prejudice must fail. *See Brown v. Ohio*, 431 U.S. 161, 167 (1977) (state's highest court is the final authority regarding matters of state law).

Although a finding of no prejudice makes it unnecessary to examine counsel's performance, *Strickland*, 466 U.S. at 697, Evans has also failed to demonstrate that original appellate counsel's performance was objectively deficient. Prior to trial, counsel had traveled to North Carolina to investigate Evans' record of prior convictions. (App. 40a). Contrary to Evans' assertions (Ptn. 7, 8), counsel objected to some of the records when they were introduced at trial. (A. 6a-7a). After trial, counsel gleaned from the record Evans' most viable claims, including the claim involving the admission of evidence of other crimes, and raised them on appeal in the Virginia Supreme Court. (App. 17a-31a). Evans' contention that counsel had an additional duty to go beyond the trial record and to continue to investigate Evans' record of prior convictions is simply untenable.[4]

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tentions and conclude that there has been no *ex post facto* violation.

(App. 35a-36a, emphasis added).

[4] Evans' assertion that the Commonwealth has "long urged" that his original trial counsel were aware at the time of trial of the errors in the record of convictions (Ptn. 8 n.8, 17) ignores the fact that the cited portions of the Commonwealth's brief from *Evans II* pertained only to a claim of prosecutorial misconduct and how the prosecution's good faith related to that claim. In the same brief, the Commonwealth expressly stated: "It may well be that defense counsel misunderstood the information...received from the Commonwealth, but the fact that the Commonwealth made a reasonable effort to communicate the information to the defense demonstrates the Commonwealth's good faith." (App. 84a n.11).

First of all, it took Evans' habeas attorney approximately one year to investigate the matter of the erroneous conviction records and to obtain the affidavit from a North Carolina official which led to the Commonwealth's confession of error.[5] It is patently unreasonable to argue that appellate counsel could have discovered and demonstrated the errors in the conviction records during the considerably shorter time that the case was on direct appeal.

More importantly, appellate counsel had no duty to go outside the trial record because nothing beyond that record, even if it had been discovered, would have been cognizable on appeal. It is beyond question that the records which were introduced at trial could not have been demonstrated to be erroneous without proof of matters outside the trial record. Virginia law is clear, however, that an appeal can only be decided upon matters of record. "The Commonwealth and the defendant must stand or fall upon the case that was made in the lower court and reflected by the record under review. [The Virginia Supreme Court] is not a forum in which to make a new case." *Guthrie v. Commonwealth*, 212 Va. 602, 604, 186 S.E.2d 69, 70 (1972). *See also Bunch v. Commonwealth*, 225 Va. 423, 436, 304 S.E.2d 271, 278 (1983) (rule applied in capital case). This Court follows the same rule. *See New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

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[5] Evans' habeas petition was filed on April 9, 1982, and was amended by Evans as late as January 1983. Evans' habeas attorney did not secure the affidavit in question until March 22, 1983. The Commonwealth confessed error on April 12, 1983. Evans' assertion that the Commonwealth "confessed" that the erroneous evidence had been "knowingly" introduced (Ptn. 2) is rebutted by the record. The letter confessing error plainly states that the error had been "unbeknownst to the prosecution or defense counsel." (App. 48a). Likewise without foundation is Evans' suggestion that the Commonwealth deliberately delayed confessing error for tactical advantage. (Ptn. 10 n.10). In *Evans II*, the Virginia Supreme Court, as well as the state trial court, decided that factual claim adversely to Evans and found that the Commonwealth had acted in good faith. (App. 40a-41a).

Thus, Evans' contention that counsel had a duty to continue to investigate matters outside the record while the case was on appeal is antithetical to established principles of appellate practice. A failure to conduct such an investigation cannot be the basis for a finding of deficient performance under the first prong of the *Strickland* test.

II. Petitioner Was Not Denied The Effective Assistance Of Counsel At The Guilt Stage Of His Trial When His Attorneys Chose Not To Object To The Prosecutor's Argument.

Evans contends that his original trial attorneys were constitutionally ineffective because they failed to object to certain portions of the prosecutor's argument[6] at the guilt stage of Evans' trial. (Ptn. 21). This claim is entirely without merit.

The state habeas judge conducted an evidentiary hearing on this claim, and made an express finding of fact that Evans' trial attorneys chose not to object to the prosecutor's argument, or to request a limiting instruction, for tactical reasons. (App. 8a-9a, 12a-13a). Counsel made a deliberate determination "that an objection and instruction would do nothing more than highlight the [prosecutor's] argument for the jury." (App. 9a).

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[6] Evans completely mischaracterizes the prosecutor's argument. The prosecution did not argue as petitioner alleges (Ptn. 21) that Evans had, in fact, killed other people. To the contrary, both cited portions of the prosecutor's argument (App. 56a) are explicitly couched in terms of comments upon evidence of Evans' "motive." During the prosecution's case, the trial court admitted, over defense counsel's objection, the written statement of one of the Commonwealth's witnesses in which the witness had stated that Evans, while telling him of his plan to escape, also told him that "he'd killed a couple of people." (A. 4a-5a). Thus, the prosecutor clearly was not arguing that Evans had, in fact, killed other people, but only that his statement to the witness was evidence of Evans' motive for attempting to escape.

Counsel's decision was eminently reasonable. Counsel had objected at length, when the evidence was admitted, to any evidence of other crimes committed by Evans. (A. 2a-3a). At one point the attorneys even moved for a mistrial. (A. 3a). All of their objections were overruled, but the trial court instructed the jury that such evidence was limited to the issue of Evans' intent. (App. 23a). In this factual context, counsel, who unlike Evans' present attorneys, were present and heard the prosecutor's argument, reasonably interpreted that argument as comment upon adverse evidence which had been admitted over their objection.

Under these circumstances, the Virginia courts correctly declined to second-guess counsel's strategic decision. *See Strickland*, 466 U.S. at 689. *See also United States v. Murzyn*, 631 F.2d 525, 534 n.15 (7th Cir. 1980) (counsel performs effectively if, out of a desire to downplay adverse evidence, counsel decides not to object to argument or request limiting instruction), *cert. denied*, 450 U.S. 923 (1981).

Counsel's desire not to highlight the prosecutor's argument is closely related to Evans' failure to demonstrate the prejudice required to sustain a claim of ineffective counsel. The state habeas judge found that the "net result" of an objection by counsel "would necessarily have been to have increased the jury's awareness of [the adverse] evidence." (App. 13a). In view of the trial court's earlier rulings on the admissibility of that evidence, and the affirmance of those rulings by the Virginia Supreme Court on appeal (App. 19a-23a), there is no reasonable probability that the outcome of the guilt stage of Evans' trial would have been any different if counsel had voiced another objection or requested another limiting instruction. *See Strickland*, 466 U.S. at 694. This conclusion is further buttressed by the fact that the Commonwealth presented overwhelming independent evidence on the issue of premeditation. (App. 19a-22a). *See also Adams v. Wainwright*,

709 F.2d 1443, 1446 (11th Cir. 1983) (no prejudice even where counsel "probably should have objected"), *cert. denied*, 104 S.Ct. 745 (1984).

Thus, Evans has failed to sustain his burden of meeting both prongs of the *Strickland* test. As the state courts concluded (App. 10a), counsel's performance was well within the range of effective assistance, and Evans suffered no prejudice as the result of trial counsel's alleged error.[7]

III. The Use Of A Transcript At Petitioner's Resentencing Proceeding Did Not Violate His Rights Under The Confrontation Clause In View Of The Undisputed Fact That He Failed To Raise Such A Claim In The State Trial Court.

Evans concedes that he failed to raise his Confrontation Clause claim in the state trial court and on direct appeal, and that he raised it for the first time in his state habeas proceedings more than a year after his resentencing. (Ptn. 11 n.12). As this Court has recognized, such a failure clearly constitutes a procedural default under Virginia law. *See Smith v. Murray*, ___U.S. ___, 106 S.Ct. 2661, 2665 (1986), *citing Coppola v. Warden*, 222 Va. 369, 282 S.E.2d 10 (1981), and *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974).

When petitioner raised this claim in his state habeas proceedings, the Commonwealth asserted that the claim

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[7] Evans suggests that one reason why this Court should grant the writ on this claim is because the Virginia Supreme Court allegedly failed to review the state habeas judge's ruling. (Ptn. 23). Again, petitioner misapprehends Virginia law. The Supreme Court of Virginia's refusal of a petition for appeal based upon a finding of "no reversible error" (App. 16a) has but one meaning, *i.e.*, the Court has found the petitioner's case lacking in merit. *Saunders v. Reynolds*, 214 Va. 697, 700, 204 S.E.2d 421, 424 (1974). *See Jackson v. Virginia*, 443 U.S. 307, 311 n.4 (1979).

had been defaulted, and responded, alternatively, on the merits of the claim. (App. 98a). The habeas trial court denied the claim "for the reasons stated in the respondent's answer." (App. 1a). The Commonwealth responded in the same manner to Evans' subsequent petition for appeal to the Virginia Supreme Court. (App. 100a-102a). The Supreme Court affirmed the denial of habeas relief, finding "no reversible error in the judgment complained of." (App. 16a).

In *Smith v. Murray*, as well as in *Murray v. Carrier*, ___U.S. ___, 106 S.Ct. 2639, 2647 (1986), this Court recognized that Virginia's procedural default rules are both legitimate and reasonable. *See Smith*, 106 S.Ct. at 2665. In *Smith*, as in this case, the Virginia Supreme Court "declined" to accept the habeas petitioner's appeal without expressing the reasons for the Court's action. *Id.* Nevertheless, this Court had no difficulty concluding that the Virginia courts had enforced the State's procedural default rules. *Id.*

In the case at bar, the state habeas judge, as well as the Virginia Supreme Court, clearly dismissed this claim primarily for the procedural default, and only alternatively on the merits. (App. 1a, 98a). Thus, Evans' claim that his confrontation claim is not barred because it is allegedly "impossible to tell" whether the state courts enforced the procedural default (Ptn. 13-14 n.14), is without merit. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (court will not exercise jurisdiction if state decision "is alternatively based on bona fide separate, adequate, and independent grounds"); *Davis v. Allsbrooks*, 778 F.2d 168, 175-176 (4th Cir. 1985) (if state courts dismiss on procedural grounds, and alternatively on the merits, federal review is nevertheless barred).

If a petitioner fails to observe reasonable state procedural requirements, this Court will decline to exercise jurisdiction regardless of whether the highest state court

expressly refuses to consider the federal question, *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463 (1936), or whether the state's highest court is completely silent on the matter, *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309-310 (1903). This Court will assume, in the latter case, that the silence is due to the procedural defect. *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). *See also Stembridge v. Georgia*, 343 U.S. 541, 547-548 (1952) (Court declined to exercise jurisdiction even when existence of an adequate state procedural ground is "debatable").

Evans' procedural default is particularly inexcusable in this case because he specifically claims that he was "denied" the opportunity to confront and cross-examine adverse witnesses. (Ptn. 26, 27 n.28). Having conceded that he failed to raise this claim in the state courts (Ptn. 11 n.12), it is difficult to understand how he was "denied" his rights under the Confrontation Clause. To the contrary, the record demonstrates that although they may have differed concerning the exact manner in which the transcript would be utilized, the defense[8] and the prosecution had agreed that the transcript would be used in lieu of certain witnesses. (A. 8a).

Petitioner's claim that, despite his approval at trial, the transcript could not have been properly used in the absence of a showing that the witnesses were unavailable (Ptn. 26), is without merit. Not only did Evans fail to object to the use of the transcript, the record also shows that the defense made no effort to compel the presence of the missing witnesses. *See* Va. Code § 19.2 269.1. (A. 1a). Evans could have sought to cross-examine such witnesses under the "adverse witness" rule. *See* Va. Code §

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[8] It is most significant that Evans has never alleged that the attorneys who represented him at his resentencing proceedings and on the subsequent direct appeal, and who failed to object to the use of the transcript, were ineffective in this, or any other, respect.

8.01-401A. (A. 1a). This Court has found that under similar circumstances, where the defense clearly did not desire that the witnesses be present, an "unavailability" rule would make little, if any, sense, and is not constitutionally required. *United States v. Inadi*, ___U.S. ___, 106 S.Ct. 1121, 1127-1129 (1986).

Finally, since petitioner had the opportunity to confront and cross-examine the witnesses in question when they testified at his original trial, the transcript was sufficiently reliable to pass muster under the Confrontation Clause. *See Ohio v. Roberts*, 448 U.S. 56, 72-73 (1980) (specifically noting that it does not matter that the defendant was represented by different counsel at the prior proceeding).[9]

IV. Petitioner's Claim Concerning Recusal Of The State Habeas Judge Does Not Present A Substantial Federal Question.

Evans filed a motion to recuse the judge who presided over the state habeas corpus proceedings. The basis for the motion was the fact that one of his original trial counsel, whose effectiveness was the subject of the evidentiary hearing, was a former deputy clerk of the Alexandria Circuit Court[10] who during his tenure had

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[9] Evans' assertion that this Court should grant certiorari on this claim to resolve an alleged "conflict" between the decisions of the Virginia Supreme Court and a lone decision of the Court of Appeals of Maryland (Ptn. 27-28) is, at best, strained. *See* U.S. Sup.Ct.R. 17.1. Furthermore, *Tichnell v. State*, 427 A.2d 991 (Md. 1981), is readily distinguishable from Evans' case because Tichnell, unlike Evans, "vociferously" objected to the use of a transcript at his resentencing proceeding. 427 A.2d at 993.

[10] Contrary to petitioner's assertion (Ptn. 29), the attorney in question was *not* "a former long-time employee" of the state habeas judge. Nor was the attorney, as suggested by Evans (Ptn. 29 n.30), anything akin to the judge's "former law clerk." Under Virginia law, the clerk of a circuit court is a constitutional officer entirely independent of the judiciary. Va. Const. Art. VII, § 4. (A. 1a). Thus, the attorney in question,

frequently worked in the courtroom at trials presided over by Judge Kent, the state habeas judge. Evans contends that Judge Kent's refusal to recuse himself from the habeas proceedings constituted a denial of due process. (Ptn. 28).

Petitioner's claim fails to present a substantial federal question. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), this Court recognized that not all matters of judicial qualification are of constitutional magnitude, and that matters concerning a judge's "personal bias" are generally within the discretion of the state legislatures. More recently, in *Aetna Life Insurance Co. v. Lavoie*, ___U.S. ___, 106 S.Ct. 1580, 1585 (1986), this Court held that the Due Process Clause requires judicial disqualification on grounds of bias "only in the most extreme of cases." *See also* 106 S.Ct. at 1589 ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications.").

The matter of Judge Kent's alleged "personal bias" was, at most, a matter of state law. The evidence presented by Evans in support of his recusal motion (App. 105a-111a), certainly did not rise to the level of a constitutional violation. *See Lavoie*, 106 S.Ct. at 1585. The Virginia Supreme Court affirmed the denial of habeas relief on this claim (App. 16a), thus finding that, under state law, Judge Kent properly declined to recuse himself. Because no substantial federal question is presented by Evans' claim, this Court is without jurisdiction to grant certiorari. *See* 28 U.S.C. § 1257(3).

CONCLUSION

By petitioner's own admission, this case involves an "extraordinary confluence of events." (Ptn. 3). For that reason, the precise issues raised by this case are unlikely

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who had been a "deputy clerk" for the Circuit Court of the City of Alexandria (App. 106a), was a former employee of an independent constitutional officer, not a former employee of the judge.

to recur. The case will have little, if any, impact beyond the limitations of its own unique facts. There do not exist any special reasons or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision of this Court.

Furthermore, three of the four claims which petitioner has presented are especially inappropriate for review by certiorari. One claim has been procedurally defaulted (claim III), another fails to raise a substantial federal question (claim IV), and a third, while it raises a federal question, is premised upon a fundamental misapprehension of Virginia law (claim I). The only remaining claim is the allegation of ineffective counsel at the guilt stage of Evans' trial (claim II). Aside from the fact that the state courts have determined that counsel made a tactical decision not to object to the prosecutor's argument and that the net effect of such an objection would have been to highlight adverse evidence, Evans has failed to demonstrate any "special or important" reason why this claim should be reviewed on certiorari. *See* U.S. Sup.Ct.R. 17.1 For these reasons, the petition should be denied.

Respectfully submitted,

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May 22, 1987

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

Va.Const. Art. VII, § 4 (in relevant part)

County and city officers.—There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.

* * *

Va. Code § 8.01-401 (in relevant part)

How adverse party may be examined; effect of refusal to testify.—A. A party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross-examination.

* * *

Va. Code § 19.2-269.1

Convicts, etc., as witnesses.—Whenever the Commonwealth or a defendant in a criminal prosecution in any circuit court in this State shall require as a witness in his behalf, a convict or prisoner in a correctional or penal institution as defined in § 53.1-1, the court, on the application of such defendant or his attorney, or the attorney for the Commonwealth, shall issue an order to the Director of the Department of Corrections to deliver such witness to the sheriff of the county, or sergeant of the city, as the case may be, who shall go where such witness may then be and carry him to the court to testify as such witness, and after he shall have so testified and been released as such witness, carry him back to the place whence he came, for all of which service such officers shall be paid out of the criminal expense funds in the state treasury such compensation as the court in which the case is pending may certify to be reasonable.

TRIAL TRANSCRIPT PAGES 297-300 (excerpts)

Mr. KLOCH: * * *

The next Commonwealth witness will be an individual by the name of Ralph Washington, and at the time this occurred, he was an inmate in the Alexandria Jail and shared a cell with the defendant.

Among other things, he will testify that the defendant told him he was up here purely to escape. He was facing a life sentence on a murder charge in Carolina. He had nothing to lose and would waste anyone that stood in his way. That is essentially the testimony that Mr. Washington would give and it is my position that under Kirkpatrick and other cases that is admissible as to motive and intent. I think either as to motive or intent that would be admissible.

MR. LONG: Well, first of all, Your Honor, I don't know that motive has anything to do with the offense of escape. I always thought, and maybe I'm wrong, but I've been taught motive comes into play where circumstantial evidence is concerned and that is not the situation.

Secondly, we have a statement from the Commonwealth Attorney, a statement that Mr. Washington made, and for the life of me I can read it upside down, inside out, sideways and every other way and I don't see a word about wasting anybody. I don't see a word about being in jail or two life sentences. If this witness gave a statement on the 3rd of February, which is seven days after the occurrence, and now comes into court and says he's going to testify about wasting people in an attempt to get away, I think his testimony is a little difficult to understand.

What I'm saying, regarding prior offenses that have not resulted in a trial, unless there is a conviction involved, they are not admissible. That would do nothing but instill prejudice in the minds of the jury. We're only trying one issue, the willful, deliberate killing and escape. Whether

he told seventy-five other people has really nothing to do with it other than to inflame the jury.

Secondly, we have no objection to the man testifying that he came up to escape, and, obviously, that's a critical part, whether he had information on the attempt to escape, but as far as killing people and awaiting a life sentence, that is not the fact. The record is to the contrary. The Commonwealth Attorney knows that. He's under an indictment in North Carolina. He's not been tried for anything. He does not stand convicted and has not received a life sentence. If that evidence comes in that Mr. Kloch proffered to the Court—and I don't know what Kirkpatrick says—but if the Court allows that in, it's going to merely be for the purpose of inflaming the jury against this defendant and we would immediately move for a mistrial. It has nothing to do with this case or the issues in this case.

* * *

THE COURT: Gentlemen, the Court is of the opinion that the evidence is admissible to show the intent or state of mind of the defendant. The objection will be overruled.

The evidence will not be admitted to show whether or not the defendant had committed other crimes in North Carolina, but merely to show his state of mind or intention when making this statement.

I will give the jury a cautionary instruction as to the weight it will be given without waiving your objection to admissibility.

MR. LONG: Your Honor is not only waiving the objection to admissibility, but you might on the record also if it comes in—the Court should consider a motion for a mistrial.

THE COURT: That motion will be denied.

TRIAL TRANSCRIPT PAGES 352-353 (excerpts)

MR. LONG: This is the excised portion; this is the original.

During the luncheon break, I had an opportunity to read Jones on Evidence and the Kirkpatrick Case, and I reiterate my argument as far as the second paragraph. That's where he said he killed a couple of people.

I will state, Your Honor, in accordance with Kirkpatrick, as well as other case law, it has absolutely no probative value at all. I ask that be excised, also; then I understand the Court's ruling on it. I think for the record I have to put that in.

MR. KLOCH: The witness didn't say anything about the other case or killing or anything of that nature and I think the statement should not be admitted at all or admitted for what it is. By his own statement, he didn't say exactly that, but he paraphrased it.

THE COURT: To be consistent on my ruling on direct examination of the witness during which the witness testified the defendant said he faced a life sentence in North Carolina or two life sentences, I have to permit this to go in. Accordingly, I'm satisfied that the ruling was correct.

MR. LONG: I understand that. I'm saying for the record I'm putting this in.

THE COURT: All right. Your objection is noted.

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THE COURT: I stated to you Defendant's Exhibit A had been admitted and explained to you the purpose for which it was admitted. I erred in that it should be A1 rather than A. A is not admitted.

EXHIBIT A-1

Statement of
Ralph Barney Washington

Page ___of ___Pages 2/3/81
Statement taken by J. N. Soos 0916 Hrs

On January 26, 1981, I was housed in Cellblock 3-C at the Alexandria Correctional Center. A guy named Evans was put in the block with me and three other inmates named Miller, Lawrence and Jasper. During the time Evans was in my block, he talked about his adventures. He said he'd killed a couple of people. Evans also talked about trying to escape. He said he had come up from North Carolina as a witness, but was going to go into court and say he didn't know anyone. He asked if he could get away in court. He asked if the deputies wore guns and which way he should go if he got free on foot. He also said if he got away, he would probably try to grab someone in a car to make them drive him away.

Jasper was the only one who tried to give Evans any information and that was to run towards the river or into an apartment complex to get away.

X [signed Ralph B. Washington]

Witness [signed Joseph N. Soos]

TRIAL TRANSCRIPT PAGES 581-582 (excerpts)

THE COURT: I'm satisfied that when you read the two together along with the certification of the Superior Court and the judge of the 10th Judicial District the indictment is the indictment that corresponds with the judgment and the commitment. The objection is overruled.

MR. LONG: If I may state for the record, not only are they not referred to by number, but circumstantially it is not proper argument; but the documents speak for themselves.

THE COURT: I agree with that. You have to read them, and whatever appears on the face of them, as well as what appears on the certification.

MR. LONG: For the purposes of the record, I make that objection, but I think that when you're dealing with something as critical as the defendant's prior record and it's going one way or the other whether he receives life or death, that the Commonwealth has got to do more than what they've done here. They could have been numbered; they must be numbered. The file must be numbered. You just can't pull it out from nowhere. There are no numbers for the record and no connection as to the two other than the fact they are stapled together.

THE COURT: Except for the certification of the clerk which states the foregoing and a copy of the indictment, the warrant and the judgment and the commitment and it makes reference to 96.8. The clerk has certified this is the indictment that corresponds with 96.8.

Given that certification, notwithstanding the fact that the indictment does not have a number on it, I'm satisfied as to its admissibility.

MR. LONG: I object to it.

THE COURT: All right, sir.

Make that the next number if you will, please.

THE CLERK: Twenty one.

THE COURT: All right.

(The document previously referred to was marked Commonwealth's Exhibit No. 21 for identification.)

RESENTENCING TRANSCRIPT PAGES 210-211 (excerpts)

MR. HOWARD: Your Honor, one matter if I may. I anticipate the Commonwealth starting off by reading the transcripts of the prior trial. My only thought, Mr. Myers and I have discussed this last night. With those individuals of course that are going to read their own parts, I think that's absolutely the proper way to do it. If the Commonwealth intends to have someone read parts like Mr. Washington, Mr. Boone, Mr. Jasper, there was another Oliver Turner and the defendant, I think one individual should read every one of those parts rather than have separate individuals read separate parts.

It seems to me and my points are well taken, it's obvious if we have five or six very credible, intelligent, and nice people that that would be a problem for the defense. If one person read everybody's part, then I guess that's only the fair way to do it. It seems to me that it can be done.

THE COURT: Any objection to that?

MR. KLOCH: I guess if that had been arranged sometime ago. I talked to Mr. Howard probably months ago and we decided to put in various people for each person. It's been at least six weeks ago.

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